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Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment, WT Docket No. 17-79; Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment, WC Docket No. 17-84

Dear Ms. Dortch:

Verizon and others have urged the Commission to allow new attachers the option of using One-Touch Make-Ready (OTMR) to help speed fiber and small-cell deployment.[1] The record shows that OTMR is safe and effective.[2] According to Corning – a fiber manufacturer with every interest in promoting policies that spur deployment – the benefits of OTMR over a five-year time frame would be substantial:

- an additional $12.6 billion in enabled capex investment for FTTP and an additional $8.8 billion in enabled capex for 5G fixed wireless; and

[1] *See*, *e.g.*, Google Fiber Comments, WC Docket No. 17-84, at 1-4 (June 15, 2017) (further references to same-day comments filed by this and other parties referred to as "[Party Name] NPRM Comments"); INCOMPAS NPRM Comments at 5-10; *see also* Verizon NPRM Comments at 4-8; Verizon Ex Parte (Mar. 8, 2018). Unless otherwise noted, all citations are to WC Docket No. 17-84.

[2] *See* Power and Communication Contractors Association Ex Parte at 2 (Nov. 30, 2017) ("PCCA Ex Parte"); INCOMPAS NPRM Comments at 9 (stating that OTMR "minimiz[es] exposure of crews to safety risks"); Google Fiber NPRM Comments at 3 (similar); CMA Strategy Consulting, "Perspectives on the Current State of Make Ready and the Potential Impact of a One-Touch Make-Ready Policy," at 13, *attached to* Verizon Ex Parte (Nov. 13, 2017) ("Make-Ready Study").

- 8.3 million incremental premises passed by fiber and 5.9 million incremental premises passed by 5G fixed wireless.[3]

Indeed, many providers today already safely use contractors in de-facto or informal OTMR arrangements to reduce costs and speed attachments.[4] Recognizing the many benefits of OTMR, the Commission's Broadband Deployment Advisory Committee voted overwhelmingly to recommend OTMR,[5] which we have supported with a few modifications that would result in a stronger OTMR process.[6]

Despite the clear benefits of OTMR and the extensive debate at the BDAC, some parties continue to propose alternatives that would undermine OTMR or they suggest half measures that do not address the fundamental problems with the existing "multiple-touch" make-ready process.[7] We and others have explained why the Commission should reject those arguments and instead adopt rules allowing providers the option of using a robust one-touch make-ready process for pole attachments[8] – as the BDAC already has recommended. Building on our prior points, we address here a few additional issues these parties have raised.

One-Touch Make-Ready is Fundamentally Different from the Existing Make-Ready Process's Self-Help Remedy

OTMR is fundamentally different from the existing make-ready process's self-help remedy, and the Commission should reject calls to confuse the two. Some parties have suggested that the existing self-help remedy and OTMR are labels that can be used interchangeably[9] and that the self-help remedy can be accomplished "using a one-touch make-

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[3] *See* "Assessing the Impact of Removing Regulatory Barriers on Next Generation Wireless and Wireline Broadband Infrastructure Investment" at 6, *attached to* Corning Ex Parte, WT Docket No. 17-79 (Jan. 25, 2018).
[4] *See* PCCA Ex Parte at 2; Make-Ready Study at 12.
[5] *See* Report of the Competitive Access to Broadband Working Group at 19-31 (Jan. 23-24, 2018), https://www.fcc.gov/sites/default/files/bdac-cabi-report-01232018.pdf ("BDAC Working Group Report").
[6] *See* Verizon Ex Parte at 4-7 (Mar. 8, 2018) ("Verizon March 8 Ex Parte").
[7] *See* AT&T Ex Parte (Apr. 19, 2018) ("AT&T April 19 Ex Parte") (proposing that the new attacher be appointed as the "project manager"); AT&T Ex Parte (Apr. 9, 2018) ("AT&T April 9 Ex Parte") (outlining AT&T's make-ready proposal); NCTA Ex Parte (Mar. 5, 2018) ("NCTA March 5 Ex Parte") (discussing NCTA's "Accelerated and Safe Access to Poles (ASAP)" proposal); NCTA Ex Parte (Apr. 4, 2018) ("NCTA April 4 Ex Parte") (same); NCTA Ex Parte (June 22, 2018) (same).
[8] *See* Google Fiber Ex Parte (Apr. 12, 2018) ("Google Fiber April 12 Ex Parte"); Verizon March 8 Ex Parte; Fiber Broadband Association Ex Parte at 2-3 (Apr. 10, 2018) ("FBA April 10 Ex Parte").
[9] *See* Pole Attachment Presentation at 2, *attached to* AT&T April 9 Ex Parte ("AT&T Poles Presentation") (arguing that "[r]egardless of whether called self-help or OTMR . . . existing attachers should be given time to move their own complex transfers").

ready process."[10] This approach would undermine the value of OTMR and perpetuate the inefficiencies inherent in the existing process.

The existing multiple-touch make-ready process is characterized by delays and uncertainties. Under the current process, each existing attacher is responsible for performing its own make-ready, and, as a matter of practice, the existing attachers' make-ready usually must proceed in a certain order. For example, if make-ready is necessary to accommodate a new attachment that will be placed at the top of the communications space, then existing attachers will move their facilities downward proceeding sequentially from the lowest attacher in the communications space to the highest attacher in the communications space.[11] While pole owners and attachers generally recognize that all make-ready work should be completed within the applicable deadline specified in the Commission's rules, the inherently sequential nature of the current make-ready process means that one party's delay in completing its make-ready work often delays other parties' ability to begin their make-ready work. As a result, make-ready is often not completed until well beyond the deadlines specified in the Commission's rules.[12] And although the Commission's rules allow new attachers to invoke a self-help remedy and use a pole-owner approved contractor if make-ready in the communications space is not completed by the applicable deadline,[13] in our experience, the self-help remedy is rarely helpful since there are inherent uncertainties about whether one existing attacher's delay has prevented other attachers from having a reasonable opportunity to complete their own make-ready.

Giving new attachers the option of using a robust OTMR process would significantly speed the make-ready process – and thus advance the rollout of broadband – by removing these delays and uncertainties.[14] If a new attacher elects OTMR, existing attachers would not have the right to perform their own make-ready. Instead, the new attacher would use a single pole-owner-approved contractor to do all make-ready work at one time. OTMR benefits attachers and pole owners by replacing multiple truck rolls with one and thereby speeding the attachment timeline and reducing aggregate make-ready costs. OTMR also benefits pole owners because in an OTMR structure, the attaching party has the responsibility for obtaining a survey and make-ready estimate and of notifying existing attachers that make-ready work will be performed rather than shifting that responsibility to the pole owner. Municipalities and residents also benefit because there will be reduced closures of streets and sidewalks for make-ready work.

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[10] *See* AT&T April 19 Ex Parte at 1.
[11] *See* Google Fiber Ex Parte at 2 (Mar. 14, 2018) ("Google Fiber March 14 Ex Parte") ("It goes without saying that if all existing attachments must be moved down (or up) the pole in order to make space for a new attachment, those existing attachments must be moved in order. That means the lowest attachment must be moved before the next lowest can be moved, and so forth. Where each attacher performs its own make-ready work, that necessarily requires multiple, sequential – not concurrent – trips to the pole.").
[12] *See* Google Fiber April 12 Ex Parte at 2 (noting that "today, make-ready is almost never completed within 60 days"); Verizon Ex Parte at 2-3 (June 21, 2018) ("Verizon June 21 Ex Parte") (explaining that existing attachers' delays in completing make-ready can significantly delay our broadband deployment).
[13] *See* 47 C.F.R. § 1.1420(i) (self-help remedy).
[14] *See* Verizon June 21 Ex Parte at 3.

All of this goes to show that an OTMR process is fundamentally different from the existing make-ready process in which each existing attacher has the right to do its own make-ready work. The defining characteristic of OTMR is that the new attacher has certainty that it can use an approved contractor to complete all make-ready at one time. This is why the BDAC's OTMR proposal makes clear that existing attachers do not have the opportunity to do their own make-ready where OTMR applies.[15]

Attempts to equate OTMR with the existing process's self-help remedy therefore only undermine OTMR's benefits. Thus, NCTA is off the mark in suggesting that an OTMR proposal is "extreme" if it does not allow existing attachers the opportunity to do their own make-ready work or to have veto power over the contractors that a new attacher can use.[16] Eliminating existing attachers' right to do their own work is not a bug but is instead the defining feature of OTMR – just as the BDAC approved. And as we've explained, NCTA's proposal that each existing attacher create its own list of approved contractors is unworkable because it would require a pole-by-pole analysis to determine if a common contractor appears on each attacher's list, and if there is no common contractor then OTMR wouldn't be possible.[17] The Commission should recognize that these parties' self-proclaimed "compromise" or "balanced"[18] OTMR proposals are really attempts to undo OTMR by giving some or all existing attachers the opportunity to do their own make-ready.[19]

Finally, AT&T has no basis for suggesting that Verizon's OTMR proposal allows existing attachers to perform their own make-ready. Seizing on our statement that it may be reasonable to require a new attacher to provide a slightly longer notice period before a contractor performs complex OTMR,[20] AT&T claims that such a longer notice period "would [also] allow

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[15] *See* BDAC Working Group Report at 21.
[16] *See* NCTA April 4 Ex Parte at 2-5.
[17] *See* Verizon March 8 Ex Parte at 5; Google Fiber March 14 Ex Parte at 2-3 ("Indeed, the self-help remedy permissible under NCTA's proposal would provide even less relief to new providers than the current rules, as NCTA would allow each existing attacher to approve its own contractors for make-ready on its facilities. If existing attachers could require that a different contractor perform make-ready for each of their attachments, the process could be even worse than today's flawed process.").
[18] *See* NCTA April 4 Ex Parte at 1 (claiming that NCTA's ASAP proposal "requires all parties to compromise") (emphasis omitted); AT&T Reply Comments at 7-8 (July 17, 2017) ("NPRM Reply Comments") (claiming to support a "balanced" OTMR approach with appropriate safeguards).
[19] *See* CenterPoint Energy Houston Electric et al. Ex Parte at 3 (May 25, 2018) (NCTA's "ASAP Proposal would likely complicate, but certainly would not simplify the make-ready process from the perspective of new pole licensees"); Google Fiber April 12 Ex Parte at 2 (stating that "what NCTA's proposal does is double-down on the existing, multi-party process" and noting NCTA's "alternative proposal looks less like an improvement over today's inefficient and uncertain process and more like a proposal designed to give existing attachers an expanded ability to delay new deployment by competitive entrants").
[20] *See* Verizon March 8 Ex Parte at 4-5.

existing attachers to perform their own complex transfers before the approved contractor performs OTMR."[21] But, as we said, the purpose of a longer notice period for complex OTMR would be for the new attacher and the pole-owner approved contractor to review plans and consult with existing attachers.[22] Under our proposal, existing attachers would not have the right to do their own complex make-ready work during the notice period.[23]

The Commission Should Not Require Broad Indemnification as a Condition of Using OTMR

We have previously explained that the Commission should not require broad third-party indemnification for consequential damages as a condition of using OTMR because such a condition would have a chilling effect on competitive entrants' use of OTMR.[24] No party disputes that providers using OTMR should be directly liable for damage caused to poles or other attachments during make-ready.[25] NCTA claims, however, that broader indemnification is required by 47 U.S.C. § 224(i).[26] But that statute merely says that an existing attacher "shall not be required to bear any of the costs of rearranging or replacing its attachment" to accommodate another party's new or modified attachment.[27] OTMR fulfills this statutory requirement because the new attacher would pay an approved contractor to move the existing attacher's facilities and the existing attacher would not incur any of those costs. Neither the plain text of Section 224(i) nor the decisions relied on by NCTA require broad indemnification for consequential damages. The fact that the Commission has stated that, as a general matter, a utility can impose reasonable service bond requirements on contractors and that a cable system operator can impose reasonable insurance requirements in leased access contracts[28] does not answer whether broad indemnification is reasonable for OTMR. As we and others have explained, imposing broad indemnification provisions – especially when they would permit recovery well beyond even what

[21] *See* AT&T Poles Presentation at 4.
[22] *See* Verizon March 8 Ex Parte at 4.
[23] AT&T also asserts that Verizon has not been specific about the notice period for complex make-ready. *See* AT&T Poles Presentation at 4. But our June 2017 comments proposed a uniform five-business days' notice for both simple and complex make-ready. *See* Verizon NPRM Comments at 7. We have explained that "[i]f the Commission decides to draw distinctions between 'routine' and 'complex' make-ready work, the Commission should at most require that existing attachers be given a slightly longer notice period before a contractor performs complex one-touch make-ready work." *See* Verizon NPRM Reply Comments at 8.
[24] *See* Verizon March 8 Ex Parte at 5-6; Google Fiber Ex Parte at 2 (Nov. 30, 2017).
[25] *See* Verizon March 8 Ex Parte at 5-6.
[26] *See* NCTA April 4 Ex Parte at 5-6.
[27] *See* 47 U.S.C. § 224(i).
[28] *See* NCTA April 4 Ex Parte at 5 (and decisions cited therein).

a third party might be able to seek from an existing attacher – is unreasonable.[29] The Commission should refrain from imposing broad indemnification on OTMR.[30]

The Commission Should Reject Half Measures That Do Not Address the Fundamental Problems of the Existing Make-Ready System

The Commission should reject proposals that fail to address the fundamental problems associated with make-ready performed by multiple parties. For example, NCTA proposes shorter timelines.[31] But, NCTA does not explain how existing attachers could meet the shorter deadlines when they struggle to meet the existing deadlines, and, as Google Fiber notes, a "shorter timeframe does nothing to ameliorate the . . . high, unpredictable costs incurred by existing attachers and charged back" to new attachers.[32] Similarly, AT&T's "project manager" proposal tinkers with the existing make-ready process but would not lead to meaningful change. AT&T suggests that appointing the new attacher as the "project manager" responsible for coordinating the timing of existing attachers' make-ready would "minimize" instances in which make-ready is not completed by the applicable deadline.[33] But AT&T's proposal does not give the project manager any power to enforce the coordination. As a result, there's no reason to believe that merely naming the new attacher as "project manager" would spur existing attachers to complete make-ready by the applicable deadlines. Instead of adopting half measures such as NCTA's "ASAP" proposal or AT&T's project-manager proposal, the Commission should adopt a robust OTMR process that solves the fundamental delays and uncertainties inherent in make-ready performed by multiple parties.

[29] *See* Google Fiber April 12 Ex Parte at 3; FBA April 10 Ex Parte at 3; Verizon March 8 Ex Parte at 5-6.
[30] *See* Verizon March 8 Ex Parte at 5-6; Google Fiber Ex Parte at 2 (Nov. 30, 2017).
[31] *See* NCTA March 5 Ex Parte at 2 (proposing shorter make-ready timeframes).
[32] *See* Google Fiber April 12 Ex Parte at 2.
[33] *See* AT&T April 19 Ex Parte at 1-2.

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For the reasons discussed above and in our prior filings, the Commission should allow providers the option of using a fulsome OTMR process and it should reject alternative proposals and half measures that would perpetuate the problems of the existing make-ready process.

Very truly yours,

Katharine R. Saunders

cc: Adam Copeland
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